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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .....

McDONNELL DOUGLAS CORPORATION,
Petitioner,

v.

PERCY GREEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

McDonnell Douglas Corporation, petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on June 28, 1972.

OPINIONS BELOW

The original majority and dissenting opinions of the United States Court of Appeals for the Eighth Circuit are reprinted in Appendix A hereto. The Order of the Court of Appeals on Petition for Rehearing, together with supplemental majority and dissenting opinions, are reprinted in Appendix B. The Order of the Court of Appeals on Re-

newed Petition for Rehearing en banc is reprinted in Appendix C. The Court of Appeals opinions have not been officially reported as of the date of the filing of this petition. The Memorandum Opinion of the United States District Court for the Eastern District of Missouri, reported at 318 F.Supp. 846, is reprinted in Appendix D.

JURISDICTION

The original opinion of the three-judge panel of the Court of Appeals was filed on March 30, 1972. In response to petitioner's timely Petition for Rehearing En Banc, the original opinion was modified by the panel on May 12, 1972 and rehearing was denied without prejudice to the right of either party to file a Petition for Rehearing addressed to the modified opinion. Petitioner then timely sought rehearing en banc on the modified opinion, which was denied by an evenly divided court on June 28, 1972. This petition was filed within 90 days of June 28, as required by Rule 22(1). **Department of Banking v. Pink**, 317 U.S. 264 (1942); **United States v. Healy**, 376 U.S. 75 (1964).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Under Title VII of the 1964 Civil Rights Act, is an employer's right to refuse to hire a job applicant who has committed illegal and unprotected acts against the employer nullified or circumscribed merely because the applicant is black?

2. In Civil Rights cases involving allegedly discriminatory acts, should the defendant be precluded from offering subjective evidence to explain his motivation for those acts?

STATUTES INVOLVED

This case involves the construction and interpretation of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and particularly § 2000e-5(g), which provides as follows:

> "No order of the court shall require . . . the hiring . . . of any individual as an employee, or the payment to him of any back pay, if such individual was . . . refused employment . . . for any reason other than discrimination on account of race, color religion, sex or national origin or in violation of § 704(a) [§ 2000e-3(a)]."

STATEMENT OF THE CASE

This suit was instituted in the district court by respondent Green under Title VII of the 1964 Civil Rights Act ("the Act"), 42 U.S.C. § 2000e *et seq.*, which was designed to provide equal opportunity in employment. Respondent, a black man, contended that petitioner McDonnell violated the Act when it refused to hire him when he applied for a job as a mechanic in July of 1965.

Green, at all relevant times, was Chairman of ACTION, a militant Civil Rights group. In October 1964, he and members of ACTION and other Civil Rights groups conducted a massive "stall in" demonstration against McDonnell, in which the participants, including respondent, intentionally stalled their cars on five main access roads to petitioner's plant at the time of the morning rush hour in an attempt to snarl traffic and to impede petitioner's operations. Respondent stopped his car on purpose, intending to block traffic, and when he refused to move it voluntarily, it was towed by the police. Respondent was arrested for obstructing traffic, a misdemeanor under Missouri law, pleaded guilty, and was fined $50.00.

On July 2, 1965, a group of protesters headed by respondent participated in a "lock-in" incident which culminated in the chaining and padlocking of a door of a building which housed employees of petitioner, locking them inside the building.

Three weeks later, Green applied for work at the McDonnell plant as a mechanic. His application was rejected, and respondent filed a complaint alleging discrimination against him "because of his involvement in civil rights activities."

After a four-day trial, the district court found that Green was refused employment because of his participation in the "stall-in" and "lock-in" which were not "protected activities" within the contemplation of § 2000e-3(a), and held that the Act was not violated by petitioner's refusal to hire respondent based upon his unlawful acts directed against it.

On March 30, 1972, a three-judge panel of the Eighth Circuit, one judge dissenting, reversed the district court and remanded for a new trial, holding (1) that respondent had presented a *prima facie* case of racial discrimination by showing that he was black and qualified for the job and (2) that petitioner had failed to sustain its burden of showing that respondent's unlawful conduct would adversely affect his ability to perform the job.

Petitioner filed a timely Petition for Rehearing en banc, which resulted in a primarily linguistic modification by the panel of Point V of the majority opinion and which also produced a supplemental dissent by Judge Johnsen. In view of the modification, McDonnell's Petition for Rehearing was overruled without prejudice to the filing of another request for rehearing on the modified opinion. McDonnell's renewed Petition for Rehearing en banc was denied by a four-to-four vote of the Court En Banc on June 28, 1972.

REASONS WHY THE WRIT SHOULD BE GRANTED

The majority opinion has formulated some unique principles and has erected some novel standards which, if allowed to stand unreviewed, could have a significant influence on employment and race relations and could revolutionize the trial of Civil Rights cases. The majority opinion, though hardly a model of clarity, raises important questions which should be resolved by this Court.

I

The principal question presented by this case is whether § 706(g) of the 1964 Civil Rights Act (42 U.S.C. § 2000e-5(g)) means what it says. That section provides as follows:

> "No order of the court shall require . . . the hiring . . . of any individual as an employee, or the payment to him of any back pay, if such individual was . . . refused employment . . . for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of § 704(a) [§ 2000e-3(a)]."

The undisturbed finding of the district court was that respondent was refused employment because of his participation in the "stall-in," an activity unlawful under Missouri law, for which he was fined $50.00 on his plea of guilty.[1] Since respondent was not exercising any of his First Amendment or Title VII rights by participating

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[1] The concurring opinion of Judge Lay on appeal takes issue with the district court's findings as to respondent's role in the "lock-in." It is unclear to what extent the majority opinion joins in that criticism, but the principles involved in this petition are the same whether the "stall-in" is considered alone or in conjunction with the "lock-in."

in the stall-in, the Court of Appeals, following **Cox v. Louisiana**, 379 U.S. 536 (1965), held that respondent's behavior was not protected by the Act. Respondent was doing nothing but disrupting petitioner's business and interfering with its operations. Can it be said, then, that there is any restriction whatsoever upon an employer's right to refuse employment to an individual, black or white, because of his engagement in such behavior?

It has always been the law of labor relations and of civil rights that an employer has the right to refuse to hire a prospective employee "for good reason, bad reason or no reason, absent discrimination." See, *e.g.*, **Tims v. Board of Education of McNeil, Arkansas**, 452 F. 2d 551 (8th Cir. 1971). The effect of the Court of Appeals' decision in this case is to repudiate this precept as regards minorities and to permit an employer to refuse to hire a person "for good reason, bad reason or no reason, **unless he is black**," in which case the employer will be presumed to have discriminated.

Judge Johnsen's dissent (p. A-23, *infra*) capsulizes the fundamental fallacy of the majority approach:

> ". . . one who has committed such unlawful deeds against some business and then seeks to be hired by it, does not, in my opinion, stand in any different position or have any right to different treatment because he is a black, than if he were a white, in relation to the right of refusal to hire him."

The Court of Appeals has disregarded the Congressional mandate that an employer shall be entitled to refuse to hire an applicant for any reason other than one based on race, color, religion, sex or national origin. Its decision was premised, in part, on a badly distorted reading of this Court's opinion in **Griggs v. Duke Power Co.**, 401 U.S. 424 (1971). In the process, the appellate court

has handed a carte blanche to self-ordained militant guardians of the public welfare, telling them that their unlawful and obnoxious behavior cannot successfully be used by the target employer as a legal reason for denying them employment. The ramifications of such a rule, not limited to the labor field, are as alarming as they are self-evident.[2]

Moreover, although the majority opinion speaks in terms of a "black man," it must be remembered that the Act covers not only race and color but also sex, religion and national origin. Apparently, therefore, the Eighth Circuit majority opinion, if allowed to stand, would effectively preclude an employer from legally rejecting a prospective qualified black employee, or a woman, or a Catholic, or a Canadian, because of his or her admittedly having:

(a) caused a "bomb scare" at the employer's plant, resulting in the evacuation of the plant and loss of production; or

(b) slandered the Chairman of the Board of the company by calling him a "Communist" on television; or

(c) assaulted the personnel manager's wife.

According to the Eighth Circuit, a qualified prospective minority group applicant could make a *prima facie*

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[2] The district court commented as follows:

"To order the rehiring of plaintiff, who has been guilty of such serious act of misconduct, cannot reasonably be said proper action to effectuate the policies of Title VII. To hold that plaintiff is entitled to be rehired is to put a premium on misconduct of this type and to encourage like conduct on the part of others. The purpose of the Act is to secure effective redress of employees' rights, to secure for them the right to exercise their lawful civil rights without discrimination because of this exercise, not to license them to commit unlawful or tortious acts or to protect them from the consequences of unlawful conduct against their employers." 318 F. Supp. at 851.

case of discrimination merely by showing the existence of a job opening, even though the employer may not have known of the applicant's religious or ethnic background when he made the decision not to hire. The majority opinion has also in effect sanctioned reverse discrimination by imposing rigorous standards with respect to applications by a minority group member but permitting the rejection of a male Caucasian American for any reason whatsoever.[3] The supplemental dissenting opinion (p. A-37, *infra*) notes that "the majority thus are holding, not that Green is entitled to the same opportunity as a white, but that he is entitled to one of a different and greater degree."

Additionally, although this case arises in the context of an application for employment, its teachings would appear to be fully relevant to disputes concerning discharges, layoffs, fringe benefits and discipline.

II

The second aspect of this case requiring this Court's attention is the remarkable holding of the Eighth Circuit panel majority that although the search in a Title VII case is for the employer's motivation, subjective evidence offered by the employer as to his reasons for his actions, carries "little weight in rebutting charges of discrimination." The prevailing Eighth Circuit opinion improperly shifts the burden of proof to the defendant almost immediately upon the filing of the lawsuit and then gags that defendant and precludes him from explaining his motivation as to the disputed decision. The inevitable cumulative effect of these novel evidentiary principles was accu-

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[3] In **Griggs v. Duke Power Co.**, 401 U.S. 424, 431 (1971), this Court said: "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

rately forecast by Judge Johnsen in his dissent (p. A-27, *infra*):

> "What the court has held can therefore, in my opinion, only mean that McDonnell is being required to rehire Green."

The apparent thesis underlying the majority's abolition of subjective evidence is a suspicion that men may lie when questioned about their motives. This type of reasoning smacks of the old common law rule which rendered a party incompetent to testify because of his interest in the outcome of the litigation. With the exception of the present case, however, modern courts have recognized the ability of the fact-finder to weigh the interest of the party in assessing his veracity. The rule propounded in this case is contrary to the Eighth Circuit's own pronouncement in **Nelson v. Grimes**, 256 F. 2d 816, 819 (8th Cir. 1958), where it said:

> "It is safe to say that whenever motive, intent, belief or knowledge of a party is a material issue or element in a case, he may testify directly with respect thereto."

This Court in **United States v. Yellow Cab Co.**, 338 U.S. 338 (1949), also acknowledged that one of the principal tasks of the fact finder in many types of cases, criminal and civil, is to determine motivation and intent and, in the process, to distinguish between truth and pretense. Petitioner is at a loss to determine how such an inquiry can be undertaken on the basis of "objective" evidence or, for that matter, to understand what "objective" evidence is.

The principles announced in the prevailing Eighth Circuit opinion were not advocated by any party or amicus curiae but were conceived *sua sponte* by the panel majority. Hence, the Court of Appeals was without benefit

of the views of the participants in this dispute as to t legality, desirability and practical effect of such rul and it obviously failed to appreciate their ramificatio in this burgeoning area of the law. Judicial efforts bend over backwards to accommodate Title VII plaintif have culminated in this decision by standing the law its head.

As perhaps indicated by the equal division within t Court of Appeals on petitioner's renewed petition fo rehearing en banc, and as well articulated by Judge Joh sen in his original and supplemental dissents, the majo ity in this case have so radically departed from wel established precedent and have so thoroughly rewritt Title VII and eroded the rights of employers that revie by this Court is appropriate and necessary.

CONCLUSION

For the reasons stated, this Petition for Writ of Ce tiorari should be granted.

Respectfully submitted

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